Supreme Court, U.S.
FILED

9 41881 APR 24 1995

OFFICE OF THE CLERK

CASE NO.: _____
SUPREME COURT OF THE UNITED STATES
TERM _____

BENNIE COLLINS PETITIONER

VS.

OFFICE OF PERSONNEL
MANAGEMENT RESPONDENT

Appeal to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Bennie Collins, Pro Se
1113 Kees Road
Lexington, Kentucky 40505
(606) 233-0155

55pp

QUESTION PRESENTED FOR REVIEW

May the Government of the United States refuse to pay a retired serviceman his earned military pension because the veteran-retiree, through inadequate information, failed to make the appropriate election on a form completed during his processing for retirement, which would require him to deposit seven percent (7%) of his post 1956 military earnings, when the Government has refused to accept the veteran-retiree's request for a waiver of making said election to deposit seven percent (7%) of his post 1956 military earnings, although accepting such a request for waiver is within the authority of the agency and would not prejudice the Government.

TABLE OF CONTENTS

Questions Presented for Review 2

Table of Authorities 4

Opinions 5

Jurisdiction 5

Statement of the Case 5

Argument 8

TABLE OF AUTHORITIES

U.S.C.A. 28 Section 1254 5

5 U.S.C. subsection 8332(j), 8334(j) (1988 & Supp. V 1993) 6

5 U.S.C. subsection 8332(j)(1) 6

5 C.F.R. subsection 831.2104-831.2107 (1988) 6

5 C.F.R. subsection 831.2104(b), 831.2107(b)(1) (1988) 6

Holterman v. Office of Personnel Management, 57 M.S.P.R. 380, 384-85 (1993) . . 6

S Rep. No. 97-504, 97th Cong., 2d Sess. 231 (1982), reprinted in 1982 U.S.C.C.A.N. 1641, 1809-10 7

5 CFR 831.2104(a)(1) 9

Office of Personnel Management v. Richmond, 496 U.S. 414 (1990) . . 13

OPINIONS BELOW

1. Opinion of the United States Court of Appeals for the Federal Circuit, Case No. 94-3481, dated January 24, 1995.[1]

2. Opinion of the United States of America Merit Systems Protection Board dated June 9, 1994.[2]

3. Opinion of the Administrative Law Judge, St. Louis Field Office, United States of America Merit Systems Protection Board, dated March 11, 1994.[3]

JURISDICTION

This Court has jurisdiction pursuant to U.S.C.A. 28 Section 1254 to review the judgment entered on January 25, 1995 by the United States Court of Appeals for the Federal Circuit.

STATEMENT OF THE CASE

---

[1] Appendix pg. 1.

[2] Appendix pg. 18.

[3] Appendix pg. 20.

In its opinion, the United States Court of Appeals for the Federal Circuit stated necessary background information, as follows:

A civil service annuitant such as Collins who retires after September 7, 1982, is entitled to credit for active duty military service performed after 1956 under both the CSRS and the Social Security System, but only if the annuitant deposits with the Civil Service Retirement Fund an amount equal to seven percent of the person's total post-1956 military pay. 5 U.S.C. subsection 8332(j), 8334(j) (1988 & Supp. V 1993). If an annuitant fails to make the requisite deposit, OPM is obligated to recompute the person's annuity payment when the person first becomes eligible for Social Security benefits. The recomputation excludes credit for the post-1956 military service for which no deposit had been made to earn entitlement to credit. 5 U.S.C. subsection 8332(j)(1)

OPM has promulgated regulations which provide that an eligible employee must file an application for deposit with, and make payment to, the appropriate office in the employing agency. 5 C.F.R. subsection 831.2104-831.2107 (1988). A former employee may also file an application for deposit, but must make the required deposit to OPM "prior to final adjudication of the application for retirement of survivor benefits." 5 C.F.R. subsection 831.2104(b), 831.2107(b)(1) (1988). An applicant is required to make the deposit before the date of retirement or before the date OPM takes final action on the retirement application. Holterman v. Office of Personnel Management, 57 M.S.P.R. 380, 384-85 (1993).

Because eligibility for Social Security benefits occur at age 62.

"Catch-62" is the term used to describe a situation where an individual with military service retiring under the civil service retirement system uses the years of post-1956 military service for the civilian pension. These military years are also automatically creditable for social security benefit purposes. In order to prevent coverage under both systems for the same period of service, the civil service retirement annuity, by law, is recomputed at age 62 (when social security eligibility begins) to eliminate the period of military service from the civil service annuity. The additional social security benefit gained for these years of military service often does not match the reduction in the civil service annuity.

S Rep. No. 97-504, 97th Cong., 2d Sess. 231 (1982), reprinted in 1982 U.S.C.C.A.N. 1641, 1809-10. In order to enjoy coverage under both systems for the same period of service, an annuitant is required to make the specified deposit.

As a part of his processing for his retirement, Bennie Collins was instructed to complete a form 1515. This is the form upon which a government employee in Collins' position must make the election to deposit seven percent of his post 1956 military pay or decline to make such a deposit.

Without understanding the ramifications, Collins declined.[4]

Collins was notified that as a result of his decision on form 1515, his retirement pay would be drastically reduced, he sought a waiver of the time limit from OPM and permission to make the required deposit. OPM refused the waiver. Collins appealed that refusal and the action of OPM has been affirmed through the administrative process and by the United States Court of Appeals for the Federal Circuit. Collins asks this court to review that decision by Writ of Certiorari.

ARGUMENT

1. The Office of Personnel Management of the United States Government essentially takes the position in this case that they have treated Petitioner unfairly, but that he has no remedy because they are allowed to treat him unfairly under applicable statutes and regulations. The question is whether this Court will allow the Government to take such an attitude.

2. Petitioner spent a total of 33 years of his life in the service of this country, 20 years military service and 13 years civil service. Because of his lack of understanding, he failed to complete Form 1515 in his best interest. As a

---

[4] A copy of the form 1515 completed by Collins appears at page 28 of the appendix.

result of his uninformed decision, Petitioner's pension, earned by his 33 years of service to his country, was reduced from $1,390.00 per month to $845.00. He can receive $268.00 in Social Security Benefits to replace that loss.

3. When notified of the ramifications of his election on Form 1515, Petitioner sought a waiver of the time limit and asked Office of Personnel Management (OPM) to allow him to deposit the seven percent with interest. OPM refused, saying:

> We note you make no specific claim of administrative error under 5 CFR 831.2104(a)(1) with respect to the time limit for making a deposit. Although you suggest that you were not aware of the need to make a 7 percent deposit for you post-1956 active duty service prior to retirement in order to have it credited in computing your annuity, **neither statute** [5 USC 8332(j) and 8334(j) (1)], **nor regulations** [5 CFR Part 831, Subpart U], **require pre-separation counseling as to deposit election rights or deadlines**. Holterman v. OPM, 57 M.S.P.R. 380 (1993). (Emphasis added).[5]

OPM is saying that there is no requirement that they inform Petitioner of the ramifications of his election on Form 1515.

---

[5] A copy of the letter from OPM dated December 7, 1993 appears at page 30 of the appendix.

Apparently, since there is no requirement that they be informed, retirees must proceed with Form 1515 at their own peril.

4. The court below stated that Form 1515 is "unambiguous."[6] Petitioner strongly disagrees. That form says nothing about the real effects of the election made thereon. It gave Petitioner no inkling of the amount of money it could cost him for the rest of his life. It contains warnings relating Petitioner's pension to Social Security. At that time, Petitioner did not know he could receive Social Security and his Civil Service/military pension and had no intention of applying for Social Security Benefits. Furthermore, this was one of several forms given to Petitioner to sign as a part of the processing for his retirement. Petitioner had spent 33 years of his life in government service. He had been given an untold number of forms to sign in those years, given that the government seems to thrive on such forms. There was no reason for Petitioner to realize that this form could penalize him to the extent of taking a substantial part of the retirement income he had earned from him for the rest of his life. As a result of this matter, Petitioner's retirement income is lower than it would have been if he had never done any Civil Service

---

[6] Opinion of the United States Court of Appeals for the Federal Circuit, pg. 10, Appendix, pg. 1.

work and had lived on his military retirement pay.

5. Petitioner believes the Dissenting Opinion filed by Judge Newman in the Court below argues his case well, and repeats it here:

> Mr. Collins petitions the court to right a wrong, wherein he has been deprived of a significant portion of his military service-based pension. Unlike many of the cases that reach us, this is not a matter of government largesse, or qualification for "entitlement". Mr. Collins' military pension was earned and vested at the time he retired from the military service. By inadequate information at the time of his retirement from the civilian service, and OPM's refusal to authorize discretionary relief, he has been severely prejudiced.
>
> Informed Consent
>
> Based on the information given him at the time he retired at age 57 from civilian service, Mr. Collins made an election. The Form 1515 did not tell him the consequences of his election. He was told those consequences four years later, when OPM sent him a calculation stating that $545 of his military-based pension of $1,390 would be replaced with Social Security payments $268. With this information in hand the error of that earlier election was manifest, and Mr. Collins sought to correct it. Mr. Collins, request for correction was denied by OPM on the basis that OPM did not make an "administrative error" in leading Mr. Collins to sign Form 1515; that

he willingly signed the Form and thus must bear the consequences, although he was not told what would be the consequences.

Correction is not barred by statute or regulation, and Mr. Collins seeks no more than ..e pension that he has earned. He asked to make a belated deposit, but he is also willing to accept far less than his statutory entitlement, and to waive his entire civilian pension and right to Social Security. OPM has denied all relief.

Form 1515 is entitled MILITARY SERVICE DEPOSIT ELECTION, and is for use "only for employees who retire with title to an immediate annuity", and who "are eligible for a civil service annuity". Mr. Collins had twenty years of military service and thirteen years of civilian service. By signing the form Mr. Collins declined to make a deposit of 7% of his military pay, the form stating that the consequence was that his civil service benefits "will be reduced at age 62 unless you are eligible for a guaranteed minimum annuity". An "Information" form that was obtained by this court states "Your decision about completing the deposit may affect your rights under the Civil Service Retirement System".

OPM does not dispute that Mr. Collins was not told the financial consequences of his action, but states that "neither the employing agency nor OPM was obligated by statute or regulation to notify Mr. Collins of the consequences of failure to pay the

deposit at the time of retirement." However, statute and regulation do not endorse uninformed consent. Mr. Collins states in his brief, without contradiction by the government, that:

> The employing agency led me to believe that it would be to my best interest to retire at the time I retired even after I had signed the form 1515 and other papers giving up my rights to the military retired pay that I had been receiving up until my retirement in 1988.

When OPM told Mr. Collins, four years later, of the consequences of his action, OPM reduced his retirement "to less than it would have been with my regular 20 year retirement from the Army, which I had prior to taking the civil service retirement." The MSPB, while upholding the OPM decision, stated that "OPM [is not] bar[red] from allowing an individual to make a deposit for military service beyond the regulatory deadline," the administrative judge citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

Mr. Collins states that had he been told that he would suffer a sizable reduction in his pension he would not have applied for credit for his civilian service. The facts and figures affecting Mr. Collins were available to OPM at the touch of a button. When he was required to make a significant choice on retirement, he was entitled to the information necessary to make an informed choice. In Richmond the Court held that the government could not be bound by its agents' inadequacies; but Richmond did not hold that the government can rely on its agents'

inadequacies to avoid meeting governmental obligations.

I stress that there was no communication of the financial consequences, although that information was in OPM's possession. The first time Mr. Collins was told of the financial consequences was when OPM sent him a computation as his 62nd birthday approached; the information that he should have been given four years earlier. It is fundamental that omission of critical information possessed by only one party will defeat any binding arrangement. On the issue of informed consent Mr. Collins said it best: "If any [one] believes that I would sign a form allowing OPM to make me pay the Government for having served an extra 13 years and was aware of the above consequences, please allow me to change my plea to insanity."

Authorization for Belated Deposit

No statute or regulation bars providing remedy to Mr. Collins. There is no government interest served by depriving him of his military pension, earned in Korea and Vietnam. This pension was vested, he had title to it, and it was being paid until the events here transpired. Mr. Collins states that he has been told that OPM has the right to waive the regulatory period for making the deposit of 7% of his military pay, and OPM agrees that waiver is within its authority. However, OPM holds that since there was no "affirmative misconduct by the agency, administrative error, or failure to provide notice", waiver is not available to Mr. Collins. Focusing on the aspect of "notice", OPM states that unless statute or regulation required OPM to tell Mr. Collins the financial

consequences of his retirement election ,there was no obligation to do so. I share Mr. Collins' distress with this inhumane and unnecessary, as well as incorrect, bureaucratic action.[7] Whether a federal employee with twenty years of military and thirteen years of civilian service receives fair and considerate treatment upon retirement is a matter of concern to the nation, both for the quality and well-being of the federal service, and preservation of the nation's principles of dignity and justice.

6. No statute or regulation requires OPM to refuse to allow Petitioner to pay the seven percent (7%) and receive the pension he earned by service to his country. From his discussions with one OPM worker, Rod Schaeffer,[8] Petitioner was given the impression that waivers of a timely election to deposit the seven percent (7%) were routinely granted and retirees were given the option of making a lump sum payment or having the sum "deemed paid" and deducted in small monthly amounts from future pension payments. Petitioner therefore thought the administrative

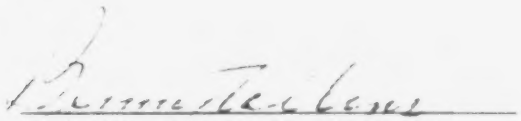
---

[7] Mr. Collins alternatively asks that he be permitted to delay the start of Social Security until age 65, "like everyone else", thus preserving his military pension for three more years. The government does not respond, and apparently did not respond to Mr. Collins.

[8] Mr. Schaeffer apparently denies making these comments to Collins. See Appendix pg. 35.

process was a formality and that he did not need counsel. Petitioner cannot understand why OPM is stubbornly refusing the waiver. There can be no prejudice to the government resulting from paying Petitioner the pension he has earned.

Respectfully submitted,



BENNIE COLLINS, PRO SE
1113 KEES ROAD
LEXINGTON, KENTUCKY 40505
(606) 233-0155

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States has been served by mailing a true copy thereof to:

RICHARD E. RICE
ATTORNEY AT LAW
COMMERCIAL LITIGATION BRANCH
CIVIL DIVISION
U.S. DEPARTMENT OF JUSTICE
ATTN: CLASSIFICATION UNIT
2ND FLOOR, TODD BUILDING
WASHINGTON, D.C. 20530

on this 13th day of May, 1995.

Bennie Collins
BENNIE COLLINS, PRO SE

APPENDIX

United States Court of Appeals for the Federal Circuit

94-3481

BENNIE COLLINS,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

DECIDED: January 24, 1995

Before NEWMAN, LOURIE and CLEVENGER, Circuit Judges.

Opinion for the court filed by Circuit Judge CLEVENGER. Dissenting opinion filed by Circuit Judge NEWMAN.

CLEVENGER, Circuit Judge.

Bennie Collins petitions for review of the March 11,

1994, initial decision of the Administrative Judge affirming the reconsideration decision of the Office of Personnel Management (OPM) denying Collins' request to make an untimely deposit in order to receive credit under the Civil Service Retirement System (CSRS) for his active post-1956 military service. On June 9, 1994, the Merit Systems Protection Board (Board) denied Collins' petition for review for failure to meet the Board's criteria for review. Collins vs. Office of Personnel Management, Docket No. SL9831940177-I-1 (June 9, 1994). The initial decision thus became the final appealable decision of the Board. We affirm.

I

A civil service annuitant such as Collins who retires after September 7, 1982, is entitled to credit for active duty military service performed after 1956 under both the CSRS and the Social Security System, but only if the annuitant deposits with the Civil Service Retirement Fund an amount equal to seven percent of the person's total post-1956 military pay. 5 U.S.C. SS 8332(j), 8334(j) (1988 & Supp. V 1993). If an annuitant fails to make the requisite deposit, OPM is obligated to recompute the person's annuity payment when the person first becomes eligible for Social Security benefits. The recomputation excludes credit for the post-1956 military service for which no deposit had been made to earn entitlement to credit. 5 U.S.C. S

8332(j) (1).

OPM has promulgated regulations which provide that an eligible employee must file an application for deposit with, and make payment to, the appropriate office in the employing agency. 5 C.F.R. SS 831.2104-831.2107 (1988). A former employee may also file an application for deposit, but must make the required deposit to OPM "prior to final adjudication of the application for retirement of survivor benefits." 5 C.F.R. SS 831.2104(b), 831.2107(b) (1) (1988). An applicant is required to make the deposit before the date of retirement or before the date OPM takes final action on the retirement application. Holterman v. Office of Personnel Management, 57 M.S.P.R. 380, 384-85 (1993).

Because eligibility for Social Security benefits occurs at age 62,

"Catch -62" is the term used to describe a situation where an individual with military service retiring under the civil service retirement system uses the years of post-1956 1956 military service for the civilian pension. These military years are also automatically creditable for social security benefit purposes. In order to prevent coverage under both systems for the same period of service, the civil service retirement annuity, by law, is recomputed at age 62 (when social security benefit gained for these years of military service often does not match the reduction in the civil service annuity.

S. Rep. No. 97-504, 97th Cong., 2d Sess. 231 (1982), reprinted in 1982 U.S.C.C.A.N. 1641, 1809-10. In order to enjoy coverage under both systems for the same period of service, an annuitant is required to make the specified deposit. Notwithstanding the somewhat catchy label used to describe the results of a statutory entitlement, the fact remains that a statue and unchallenged regulations specify with no room for doubt that a civil service annuitant cannot enjoy the full benefit of the post-1956 military service without timely paying a price.

II

Collins retired from the military after 20 years of service. Thereafter, Collins was a civilian employee of the government until he retired from his food service foreman's job at the Veterans Administration Medical Center in Lexington, Kentucky on December 31, 1988, at age of 57. In the course of perfecting his civilian retirement, Collins on October 31, 1988 signed OPM Form 1515, a document entitled "MILITARY SERVICE DEPOSIT ELECTION." The form states in its first textual paragraph:

Our records indicate that you (or the deceased employee named above) had military service after 1956 and are eligible for a civil service annuity. If you are eligible for a Social Security benefit which includes credit for this military service (or will be eligible at age 62) you must either make a deposit for the military service to the Civil Service Retirement System or your civil service benefits will be

reduced at age 62 unless you are eligible for a guaranteed minimum annuity.

The form continues to state:

> Instructions to employee (or survivor): Your decision about making this deposit may affect your rights under the Civil Service Retirement System:
>
> 1. Please read the attached "Information for employee or survivor" carefully to be sure you understand the consequences of not making the deposit for military service.

The attached information states that persons who qualify for Social Security old age or survivor benefits

> have the option of either: (1) making the deposit and thereby avoiding a reduction in annuity at age 62 (or 60 for survivors), when the military service is credited for Social Security purposes, or (2) not making the deposit and having the annuity adjusted at age 62 (or 60 for survivors).

The information specifies that the amount of the deposit for post-1956 military service is seven percent of military basic pay. OPM Form 15156 and its attached information do not include annuitant specific calculations, such as the number of dollars equaling seven percent of the military pay or the number of dollars by which the annuitant's civil service benefits will be reduced at the time of eligibility for Social Security benefits if the annuitant fails timely to make the required deposit. The form and its information, however, give unmistakable notice that a person's annuity will be

reduced at age 62 if no deposit has previously been made to earn entitlement to the benefit of post-1956 military service. At the bottom of Form 1515, just above his signature, Collins executed his election:

> EMPLOYEE (OR SURVIVOR) ELECTION
>
> I have read this information concerning my rights to make deposit for post-1956 military service. (Mark "x" in the appropriate box below to indicate your election.)

Collins put his "x" in the box preceding "I have decided not to make (or complete) this deposit."

In due course, the Social Security Administration notified OPM that Collins was eligible for Social Security benefits based on his post-1956 military service. Because Collins had not made the required deposit to retain credit for his military service, OPM recomputed Collins' annuity. When notified of the reduction in his annuity, Collins sought reconsideration by OPM requesting permission to make the required deposit in order to reverse OPM's recomputation of his annuity. OPM denied Collins' request:

> We note you make no specific claim of administrative error under 5 CFR 831.2104(a) and 5 CFR 831.207(a) (1) with respect to the time limit for making a deposit. Although you suggest that you were not aware of the need to make a 7 percent deposit for your post-1956 active

> duty service prior to retirement in order to have it credited in computing your annuity, neither statute (5 CFR Part 831, Subpart U), require pre-separation counseling as to deposit election rights or deadlines. Holterman v. OPM, 57 M.S.P.R. 380 (1993).
>
> Because we have no record of any timely inquiry from you regarding this matter, we find that you did not exercise due diligence in pursuing the deposit option when it was still available. Therefore, you are not eligible to make a deposit at this time....

Collins timely appealed to the Board from OPM's November 16, 1993 reconsideration decision.

III

The Board noted that during the telephonic hearing Collins testified that he was unaware when he retired of the need to make the deposit before he retired or before OPM finally adjudicated his application for retirement. Collins did not claim that he had been misinformed by any agency personnel, and candidly admitted that "he himself was to blame for his failure to make a timely deposit." In response to Collins' statement that he was unaware, the Board found

> his testimony lacking in credibility because it is inconsistent with his conduct in signing OPM Form 1515, Military Service Deposit Election, opting not to make a deposit. This

> form, as signed by (Collins), acknowledges receipt by him of written information regarding the consequences of failing to make a timely deposit. Nonetheless, (Collins) freely elected not to make a deposit.

Finding no ground on which to excuse Collins from the consequences of his free election, the Board affirmed OPM's reconsideration decision.

IV

Collins argues on appeal that he made a mistake in signing a form "that I didn't understand the consequences of" in terms of the amount of dollars that were at stake. According to Collins, OPM has reduced his annuity from $1390 to $845 per month, and his Social Security benefit of $268 per month does not cover the $545 monthly reduction in his annuity. Collins states that he is "willing to pay the 7% of my post 1956 military (pay) plus interest to makeup for the mistake of signing form 1515."

The government, in response, points us to the statutes and regulations that create Catch 62 and specify that deposits made to ensure full credit for post-1956 military service must be made before retirement or before OPM completes the processing of one's retirement application. No statute or regulation provides for later tender or deposits, even with interest. The government contends that

Collins has failed to establish any ground for relief from the regulatory time requirement for making a deposit. Finally, the government reminds us that the Board found incredible Collins' argument that he did not understand the ramifications of the form he freely signed.

V

Although Collins characterizes the Catch 62 law and regulations as unfair to one who has served his country on the battlefield and in peace, he does not otherwise suggest that the law and regulations are invalid or unenforceable. Nor does Collins contend that he satisfies any of the grounds upon which the Board has found authority to relieve an applicant from the burdens of a regulatory restriction. In Speker v. Office of Personnel Management, 45 M.S.P.R. 380 (1990), aff'd, 928 F. 2d 410 (Fed Cir. 1991) (Table), the Board enumerated three grounds for waiver of a regulatory deadline requirement: if (1) the regulation itself specifies circumstances for waiver, (2) affirmative misconduct by the agency warrants equitable estoppel of the regulatory provision or (3) an agency fails to provide notice of election rights and corresponding deadlines, if such notice is required by statute or regulation. Id. At 395.

With regard to the instant case, the pertinent regulations do not provide any opportunity for waiver of the deposit-making deadline dates. Collins makes no claim that agency

misconduct caused his "mistaken" election, and the pertinent statues and regulations do not require that notice be given to the annuitant. See Davis v. Office of Personnel Management, 918 F. 2d 944, 946-47 (Fed. Cir. 1990).

Collins in essence asks this court to add a fourth ground for relief from failure to meet statutory and regulatory requirements, namely, unilateral mistake in signing an unambiguous election form that notifies the signer of the consequences of election. The Board has previously rejected unilateral mistake as a ground for voiding freely made elections concerning survivor annuities. See Carlton v. Office of Personnel Management, 52 M.S.P.R. 225, 229 (1992) (mistaken election of full survivor annuity not voidable when agency acted properly).

We can think of no reason why the same view should not prevail in the setting of elections to deposit or not to deposit sums necessary to implement Catch 62. Indeed, that view is in harmony with and promotes the settled proposition that one is not relieved from the consequences of a written election absent a showing that mental incompetence, duress or fraud is the reason for an election one later seeks to void. Coleman v. Prudential Bache Sec., 802 F.2d 1350, 1352 (11th Circ. 1986); Comprehensive Accounting Corp. V. Rudell, 760 F.2d 138, 140 (7th Cir. 1985); Donovan v. Mercer, 747 F. 2d 304, 308 n . 4 (5th Cir. 1984); Fraass Surgical Mfg. Co.v. United States, 571 F. 2d 34, 37-38 (Ct.

Cl. 1978); Richardson Camera Co. V. United States, 467 F. 2d 491, 496 (Ct. Cl. 1972); Schoeffel v. United States, 193 Ct. Cl. 923, 934-35 (1971); 1 Samuel Williston, A Treatise on the Law of Contracts, S 90A (3d ed. 1957); Restatement (Second of Contracts S 23, comments b, e (1981).

Finally, we address briefly Collins' suggestion that his election should be voided because he was not specifically informed about the dollar consequences of his election at the time it was made. Collins does not contend that he requested and was denied any specific information before making his election. Furthermore, his contention fails for want of any statutory or regulatory support for the proposition that the government, in the Catch 62 setting, is required to provide he annuitant with any information concerning the election. That OPM wishes to supply information concerning the election is beneficial, but not required.

The Board's decision is

AFFIRMED

No costs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-3481

BENNIE COLLINS,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT,

Respondent,

NEWMAN, Circuit Judge, dissenting.

Mr. Collins petitions the court to right a wrong, wherein he has been deprived of a significant portion of his military service- based pension. Unlike many of the cases that reach us, this is not matter of government largesse, or qualification for "entitlement". Mr. Collins' military pension was earned and vested at the time he retired from the military service. By inadequate information at the time of his retirement from the civilian service, and OPM's refusal to authorize discretionary relief, he has been severely prejudiced.

Informed Consent

Based on the information given him at the time he retired at age 57 from civilian service, Mr. Collins made an election. The Form 1515 did not tell him the consequences

of his election. He was told those consequences four years later, when OPM sent him a calculation stating that $545 of his military-based pension of $1,390 would be replaced with Social Security payments of $268. With this information in hand the error of that earlier election was manifest, and Mr. Collins sought to correct it. Mr. Collins' request for correction was denied by OPM on the basis that OPM did not make an "administrative error" in leading Mr. Collins to sign Form 1515: that he willingly signed the Form and thus must bear the consequences, although he was not told what would be the consequences.

Correction is not barred by statute or regulation, and Mr. Collins seeks no more than the pension that he has earned. He asked to make a belated deposit, but he is also willing to accept far less than his statutory entitlement, and to waive his entire civilian pension and right to Social Security. OPM has denied all relief.

Form 1515 is entitled MILITARY SERVICE DEPOSIT ELECTION and is for use "only for employees who retire with title to an immediate annuity", and who "are eligible for a civil service annuity". Mr. Collins had twenty years of military service and thirteen years of civilian service. By signing the form Mr. Collins declined to make a deposit of 7% of his military pay, the form stating the consequence was that his civil service benefits " will be reduced at age 62 unless you are eligible for a guaranteed minimum annuity".

An "Information" form that was obtained by this court states "Your decision about completing the deposit may affect your rights under the Civil Service Retirement System".

OPM does not dispute that Mr. Collins was not told the financial consequences of his action, but states that "neither the employing agency nor OPM was obligated by statute or regulation to notify Mr. Collins of the consequences of his action, but states that "neither the employing agency nor OPM was obligated y statute or regulation to notify Mr. Collins of the consequences of failure to pay the deposit at the time of retirement." However, statute and regulation do not endorse uniformed consent. Mr. Collins states in his brief, without contradiction by the government, that:

> The employing agency led me to believe that it would be to my best interest to retire at the time I retired even after I had signed the form 1515 and other papers giving up my rights to the military retired pay that I had been receiving up until my retirement in 1988.

When OPM told Mr. Collins, four years later, of the consequences of his action, OPM reduced his retirement "to less than it would have been with my regular 20 year retirement from the Army, which I had prior to taking the civil service retirement." The MSPB, while upholding the OPM decision, stated the "OPM (is not) bar(red) from

allowing an individual to make a deposit for military service beyond the regulatory deadline," the administrative judge citing Office of Personnel Management v. Richmond, 496 U.S. 414 (1990).

Mr. Collins states that had he been told that he would suffer a sizable reduction in his pension he would not have applied for credit for his civilian service. The facts and figures affecting Mr. Collins were available to OPM at the touch of a button. When he was required to make a significant choice on retirement, he was entitled to the information necessary to make an informed choice. In Richmond did not hold that the government can rely on its agents' inadequacies to avoid meeting governmental obligations.

I stress that there was no communication of the financial consequences, although that information was in OPM's possession. The first time Mr. Collins was told of the financial consequences was when OPM sent him a computation as his 62nd birthday approached the information that he should have been given four years earlier. It is fundamental that omission of critical information possessed by only one party will defeat any binding arrangement. On the issue of informed consent Mr. Collins said it best: "If any (one) believes that I would sign a form allowing OPM to make me pay the Government for having served an extra 13 years and was aware of the above

consequences, please allow me to change my plea to insanity."

Authorization for Belated Deposit

No statute or regulation bars providing remedy to Mr. Collins. There is no government interest served by depriving him of his military pension, earned in Korea and Vietnam. This pension was vested, he had title to it, and it was being paid until the events here transpired. Mr. Collins states that he has been told that OPM has the right to waive the regulatory period for making the deposit of 7% of his military pay, and OPM agrees that waiver is within its authority. However, OPM holds that since there was no "affirmative misconduct by the agency, administrative error, or failure to provide notice", waiver is not available to Mr. Collins. Focusing on the aspect of "notice", OPM sates that unless stature or regulation required OPM to tell Mr. Collins the financial consequences of his retirement election, there was no obligation to do so I share Mr. Collins' distress with this inhumane and unnecessary, as well as incorrect, bureaucratic action.[1] Whether a federal employee with twenty years of military and thirteen years of civilian

---

[1] Mr. Collins alternatively asks that he be permitted to delay the start of Social Security until age 65, "like everyone else", thus preserving his military pension for three more years. The government does not respond, and apparently did not respond to Mr. Collins.

service receives fair and considerate treatment upon retirement is a matter of concern to the nation, both for the quality and well-being of the federal service, and preservation of the nation's principles of dignity and justice.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BENNIE COLLINS, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency (CSA 3 113 866)	)	DOCKET NUMBER SL-0831-94-0177-I-1 DATE: _____

Bennie Collins, Lexington, Kentucky, pro se
John Pearson, Wasington, D.C., for the agency

BEFORE
Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on March 11, 1994, because it does not meet the criteria for review set forth at 5 C.F.R. S 1201.115. This is the Board's final

order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. S 1201.11(b).

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. S 7703(a) (1). You must submit your request to the court at the following address:

United States Court of Appeals
For the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The Court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. S 7703(b) (1).

FOR THE BOARD: /S/
Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
ST. LOUIS FIELD OFFICE

BENNIE COLLINS, Appellant, v. OFFICE OF PERSONNEL MANAGEMENT, Agency (CSA 3 113 866)	DOCKET NUMBER SL-0831-94-0177-I-1
	DATE: March 11, 1994

Bennie Collins, Lexington, Kentucky, pro se.
John Pearson, Washington, D.C., for the agency

BEFORE

Jack E. Salyer
Administrative Judge

INITIAL DECISION

The appellant timely appealed to the Merit Systems Protection Board (the Board) from the reconsideration decision of the Office of Personnel Management (OPM) dated November 16, 1993, which upheld its initial determination that his annuity under the Civil Service

Retirement System (CSRS) had to be recomputed to eliminate all service credit for his post-1956 military service.[1] In OPM's reconsideration decision, it also found that, because the appellant had not timely made the seven percent deposit of post-1956 military earnings which is required to receive service credit, he was not eligible to make that deposit during the reconsideration process. The appellant has appeal rights to the Board under 5 U.S.C. SS 7701(a) and 8347(d) and 5 C.F.R. S 831.110.

For the reasons set forth below, I AFFIRM OPM'S reconsideration decision.

ANALYSIS AND FINDINGS

The appellant has failed to demonstrate by a preponderance

---

[1] Because OPM initially recomputed the appellant's civil service annuity effective June 1, 1993, based on erroneous information in its possession that his birth date was May 7, 1931, instead of December 7, 1931, the date of recomputation was also initially in issue. Appeal file, Tabs 1, 4(2). However, in OPM's response top the appellant's appeal, it stated that, based on information which it had received from the Social Security Administration (SSA) verifying that his birth date was December 7, 1931, and that he would thus not be receiving Social Security benefits until December 7, 1993, it had rescheduled the effective date of his annuity reduction to January 1, 1994. Appeal File, Tab 4. During the telephonic hearing, the appellant stipulated that the date of recomputation of his annuity was no longer in issue. Hearing Tape (HT), Side A.

of the evidence that he is entitled to the retirements benefits which he seeks.

The appellant bears the burden of proving, by a preponderance of the evidence, that he is entitled to the retirement benefits which he seeks. See Cheeseman v. Office of Personnel Management, 21 M.S.P.R. 118, 124 (1984), aff'd, 791 F.2d 138, 141-42 (fed. Cir. 1986), cert denied, 479 U.S.1037 (1987).

The following facts and law are undisputed.[2] Under the Omnibus Budge Reconciliation Act of 1982, Pub. L. No. 97-253 (codified at 5 U.S.C. SS 8332(j) and 8334(j)), a civil service annuitant who retired after September 7, 1982, is entitled to credit for active-duty military service performed after 1956 under both the CSRS and the Social Security system, but only if he deposits with the Civil Service Retirement Fund a sum equal to seven percent of his total post-1956 military pay prior to separation or prior to final adjudication by OPM of his application for retirement. 5 C.F.R. S 831.2107. If an annuitant subject to Pub. L. No. 97-253 does not make such a deposit, OPM must recompute his annuity payment, excluding credit for post-1956 military service, when the annuitant becomes eligible

---

[2] I convened a telephonic hearing on March 4, 1994. OPM's representative did not participate in the hearing.

for Social Security benefits. 5 U.S.C. S 8332(j) (1).

The appellants' military service from 1956 until his retirement from the Department of the Army in 1968 would have been covered service for civil service retirement purposes under the foregoing statutory provisions if he had made the requisite deposit prior to the date of his separation from his civilian position with the Federal Government (December 31, 1988) or prior to the final adjudication by OPM of his application for retirement. The appellant elected not to make such a deposit. The appellant also signed OPM Form 1515, Military Service Deposit Election, on October 31, 1988, attesting that he had reviewed information which was attached to the form as to the consequences of not making a deposit and/or not making one in a timely fashion. Therefore, after the appellant became eligible for Social Security benefits on December 7, 1993, his civil service annuity was recomputed, effective January 1, 1994, to reflect his failure to make the requisite deposit.

Thereafter, the appellant requested that OPM allow him to make an untimely deposit. After OPM issued an initial decision denying the appellant's request, he requested reconsideration of OPM's initial determination. OPM's reconsideration decision was issued on November 16, 1993. The appellant then filed the present appeal. See generally Appeal File.

During the telephonic hearing, the appellant testified that, when he retired, he was not aware that he had to make a deposit before he retired or before the final adjudication of his application for retirement by OPM in order to avert recomputation of his civil service annuity when he became eligible for Social Security benefits. The appellant candidly admitted, however, that he was not claiming that anyone from his employing agency or OPM had provided him with misinformation and that he himself was to blame for his failure to make a timely deposit. Finally, the appellant testified that he is asking only to be allowed to make an untimely deposit. Finally, although the appellant seeks to make an untimely deposit, he stipulated to the correctness of OPM's recomputation of his annuity based on the absence of that deposit. HT, Side A.

In Holtermann v. Office of Personnel Management, 57 M.S.P.R. 380, 384-85 (1993), in discussing the statutory and regulatory provisions which are at issue in the instant appeal, the Board held that, under OPM's regulation, an applicant for retirement benefits is required to have made a deposit either before he retires or before OPM takes final action on his application. The Board further held that:

> There are three potential bases for waiving a regulatory deadline: (I) the regulation itself may specify circumstances under which the

> deadline should be waived; (ii) an agency may be equitably estopped from enforcing a regulatory deadline if it engaged in affirmative misconduct; and (iii) an agency's failure to provide notice of election rights and corresponding deadlines may warrant a waiver of a filing deadline, if such notice is required by statute or regulation. Speker v. Office of Personnel Management, 45 M.S.P.R. 380, 385 (1990), aff'd, 928 F.2d 410 (Fed. Cir. 1991) Table).[3]

For the following reasons, like the Board in Holtermann, I find that none of these bases are applicable to the facts of the instant case. First, the regulation in question makes no provision for an untimely deposit after final adjudication of applicant's retirement application by OPM. 5 C.F.R. SS 831.2101-.2107; see Holtermann, 57 M.S.P.R. at 385.

Second, the appellant does not allege that either his employing agency or OPM affirmatively misled him regarding his rights under Pub.L. No. 97-253. In addition,

---

[3] Because the deadline for making a deposit is regulatory, not statutory, in nature, the decision of the United States Supreme Court in *Office of Personnel Management v. Richmond*, 496 U.S. 414 (1990), does not bar OPM from allowing an individual to make a deposit for military service beyond the regulatory deadline. *See Pinkston v. Office of Personnel Management*, 57 M.S.P.R. 347, 350 n.2 (1993).

although the appellant claims that he was not aware that he had to make a deposit before he retired or before the final adjudication of his application for retirement by OPM, I find his testimony lacking in credibility because it is inconsistent with his conduct in signing OPM Form 1515, Military Service Deposit Election, opting not to make a deposit. This form, as signed by the appellant, acknowledges receipt by him of written information regarding the consequences of failing to make a timely deposit. Nonetheless, the appellant freely elected not to make a deposit. Appeal File, Tab 4; see Hillen v. Department of the Army, 35 M.S.P.R. 453, 460 (1987). Therefore, I find that before electing not to make a deposit, the appellant was clearly on notice of the consequences of such an action. In an event, based on the appellant's candid admission, I find that he was not affirmatively misled by his employing agency or by OPM regarding his rights under Publ. L. No. 97-253. See Holtermann, 57 M.S.P.R. at 385.

Finally, I find that neither Pub. L. No. 97-353 nor its implementing regulation requires either pre-separation counseling concerning or notice of the potential impact of the statutory and regulatory provisions. Thus, even accepting as true the appellants's claim that he was not timely notified of the deposit requirement, such failure does not warrant a waiver of the deadline for making a deposit. See Holtemann, 57 M.S.P.R. at 385; Sperk, 45 M.S.P.R. at

386.

Accordingly, I find no basis for allowing the appellant to make a belated deposit for his post-1956 military service. See Holtermann, 57 M.S.P.R. at 384-85. Therefore, I find that the appellant has not carried his burden of establishing by a preponderance of the evidence that he is entitled to the retirement benefits which he is seeking. See Cheeseman, 21 M.S.P.R. at 124.

DECISION

OPM's reconsideration decision is AFFIRMED.

FOR THE BOARD: /S/
Jack E. Salyer
Administrative Judge

NOTICE TO THE APPELLANT

This initial decision will become final on April 15, 1994, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a

petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition for review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must file your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this

decision becomes final. To be timely, your petition must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

United States
OFFICE OF
PERSONNEL MANAGEMENT
Washington, DC 20415-0001

In Reply Refer To: CRR:JAC:dsp
Your Reference: CSA 3 113 866

Dec. 7, 1993

Bennie Collins
1113 Kees RD..
Lexington, KY 40505

Dear Mr. Collins:

This is in reply to your request for reconsideration of the initial decision of the Office of Personnel Management (OPM). This decision found that your civil service annuity had to be recomputed to eliminate all credit for post 1956 military service. Based on the analysis and findings below, we have affirmed the initial decision.

BACKGROUND

The Social Security Administration (SSA) has informed us that you were eligible for Old Age and Survivors Insurance (OASI) benefits based on your post-1956 military service under the Social Security Act on June 1993. At that time, you had earned a sufficient number of quarters to qualify for OASI benefits. Whether you applied for or received those benefits at that time is immaterial to the determination to adjust your annuity.

Based upon your eligibility for these benefits, we

recomputed your annuity to eliminate credit for military service prior to retirement.

ANALYSIS AND FINDINGS

The Office of Personnel Management is charged with the administration of the Civil Service Retirement law and is expected to pay benefits as provided by law. Also, we are obligated under law and regulation to correct any error(s) in payment of benefits.

Public Law 84-881 eliminates credit for active military service performed after December 31, 1956, from the computation of an annuity if the annuitant or his/her survivor is entitled (or would, on proper application, be entitled) to OASI benefits under the Social Security Act (as amended).

Public Law 97-253, enacted on September 8, 1982 and effective October 1, 1982, made significant amendments to Public Law 84-881. One of these amendments provides that individuals, or their survivors, whose annuities are based on a separation or death in service occurring after September 8, 1982, may receive credit for their active duty military service performed after December 31, 1956 under both the Civil Service Retirement and Social Security Systems, provided such individuals, or their survivors, pay a deposit into the Civil Service Retirement and Disability Fund for the post-1956 military service, equal to 7 percent of the basic pay or estimated earnings for the period(s) of military service performed after 1956. Section 831.2107 of Title 5, Code of Federal Regulations provides that such deposits must be paid prior to separation or prior to final

adjudication of the application for retirement or survivor benefits by the Office of Personnel Management.

If the annuitant, or the survivor of such an individual who dies in service, does not pay the deposit prior to separation from service or final adjudication of the application for retirement or survivor benefits, we must reduce the civil service annuity by excluding credit for the post-1956 military service if the individual or his survivor becomes entitled (or, upon proper application, would be entitled) to Social Security benefits.

Our records indicate that you separated from service after September 8, 1982 and you elected not to pay a deposit for your post-1956 military service. Therefore, you annuity was reduced appropriately by eliminating credit for post-1956 military service based on information furnished by the Social Security Administration that you are eligible for Social Security benefits.

We note you make no specific claim of administrative error under 5 CFR 831.2104(a) and 5 CFR 831.2107(a)(1) with respect to the time limit for making a deposit. Although you suggest that you were not aware of the need to make a 7 percent deposit for your post-1956 active duty service prior to retirement in order to have it credited in computing your annuity, neither statute (5 U S C 8332(j) and 8334(j)(1), nor regulations (5 CFR Part 831, Subpart U), require pre-separation counseling as to deposit election rights or deadlines. Holterman v. OPM, 57 M.S.P.R. 380 (1993).

Because we have no record of any timely inquiry from you regarding this matter, we find that you did not exercise due diligence in pursuing the deposit option when it was still available. Therefore, you are not eligible to make a deposit at this time is denied.

We also not that you claim your birth date was December 7, 1931 and that you will not be eligible for social security benefits until December 1993. To substantiate your claim you submitted a copy of the 1939 Census showing this as your date of birth. However, all of your military records and your retirement application, which you signed, show you date of birth and your retirement application, which you signed, show your date of birth as May 7, 1931. More important to the implementation of the law discussed above, the Social Security Administration shows you are eligible for their OASI benefits at age 62 on June 1, 1993. Therefore, based on the decision made by the SSA as to your entitlement we must assume that your annuity has been correctly adjusted on June 1, 1993. (Should SSA certify a new date of first eligibility we would adjust our recomputation accordingly.)

The initial decision is affirmed.

APPEAL RIGHTS

This constitutes the final decision of the Office of Personnel Management. You have the right to appeal to the Merit Systems Protection Board (MSPB). The enclosed sheet provides filing instructions. Please note that you have 25 days from the date of this letter to file your appeal.

Sincerely,

/S/
William C. Jackson, Chief
Reconsideration Division

Enclosure

United States
OFFICE OF
PERSONNEL MANAGEMENT
Washington, DC 20415-0001

March 3, 1994

Jack E. Salyer
Administrative Judge
Merit Systems Protection Board
911 Washington Ave., Suite 410
St. Louis, MO 63101-1203

Re: Appeal of
Bennie Collins v. OPM
SL-0831-94-0177-I-1
CSA 3 113 866

Dear Mr. Salyer:

This responds to the February 24 and February 25, 1994, Orders relating to appellant's claim, that our reconsideration decision dated November 16, 1993, is not consistent with information he received from OPM employee Rodney Schaeffer regarding a deposit for post-1956 military service.

Mr. Schaeffer was contacted by telephone at (412) 794-8442. He stated that he had no current personal knowledge or memory of a conversation with appellant; but that he routinely advises applicants that such deposit can be allowed after retirement if the applicant demonstrates that failure to complete a timely deposit resulted from agency administrative error.

This information is consistent with the analysis presented in our reconsideration decision, relating to the provisions of 5 CFR 831. 2104, 831.2107 and the Board's reasoning in

Holtermann v. OPM, 57 M.S.P.R. 380 (1993).

Sincerely,

/S/
John Pearson
Agency Representative
Technical Reference Branch
Office of Retirement Policy Development

cc: Bennie Collins
1113 Kees Road
Lexington, KY 40505

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing letter and attachments, if any, were sent by regular mail this date to the addresses listed as "cc's" in that letter.

Date 3-3-94

/S/
John Pearson
Agency Representative
(202) 606-0575 FAX (202) 606-0578

U.S. Office of Personnel Management
OFFICE OF RETIREMENT POLICY
DEVELOPMENT
Post Office Box 16
Washington, DC 20044

Supreme Court, U.S.
FILED
OCT 13 1995

(2)

No. 94-1881

In the Supreme Court of the United States

OCTOBER TERM, 1995

BENNIE COLLINS, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
MARC RICHMAN
RICHARD E. RICE
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether the Office of Personnel Management erred in declining to permit petitioner to rescind a written election made at the time of his retirement, when the election was not the product of government error or misinformation.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Davis v. *OPM*, 918 F.2d 944 (Fed. Cir. 1990)	7
Holtermann v. *OPM*, 57 M.S.P.R. 380 (1993)	5, 7
Nordstrom v. *United States*, 342 F.2d 55 (Ct. Cl. 1965)	7
Speker v. *OPM*, 45 M.S.P.R. 380 (1990), aff'd, 928 F.2d 410 (Fed. Cir. 1991)	7
Templeton v. *OPM*, 951 F.2d 338 (Fed. Cir. 1991)	6-7

Statutes and regulations:

5 U.S.C. 8332(j)	3, 4
5 U.S.C. 8334(j)	5
5 C.F.R.:	
Section 831.2104(b)	5
Section 831.2105(b)	5
Section 831.2107(b)(1)	5

Miscellaneous:

S. Rep. No. 504, 97th Cong., 2d Cong., 2d Sess. (1982)	4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1995

NO. 94-1881

BENNIE COLLINS, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 45 F.3d 1569. The final order of the Merit Systems Protection Board (Pet. App. 18-19) is unreported, but the decision is noted at 63 M.S.P.R. 69 (Table). The opinion of the Administrative Judge (Pet. App. 20-29) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1995. The petition for a writ of certiorari was filed on April 24, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner retired from the military in 1968 after 20 years of active service; he retired from his subsequent civilian position with the government in 1988, at age 57. Pet. App. 4. At the time of his civil service retirement, petitioner executed a standard form (OPM Form 1515), entitled "MILITARY SERVICE DEPOSIT ELECTION." *Ibid.* This form stated:

> Our records indicate that you * * * had military service after 1956 and are eligible for a civil service annuity. If you are eligible for a Social Security benefit which includes credit for this military service (or will be eligible at age 62) you must either make a deposit for the military service to the Civil Service Retirement System *or your civil service benefits will be reduced at age 62* unless you are eligible for a guaranteed minimum annuity.

Id. at 4-5 (emphasis added).

The election form also explicitly cautioned petitioner to read an attached information sheet "carefully to be sure you understand the consequences of not making the [required] deposit for military service." Pet. App. 5. The attachment informed petitioner that he "ha[d] the option of either: (1) making the deposit and thereby avoiding a reduction in [civil service retirement] annuity at age 62 * * *, when the military service is credited for Social Security purposes, or (2) not making the deposit and having the annuity adjusted at 62." *Ibid.*

Petitioner signed the election form, indicating that he had read the "information concerning [his] rights

to make deposit for post-1956 military service" and that he had "decided *not* to make (or complete) this deposit." Pet. App. 6. Petitioner thus chose, at the time of his retirement, not to make the deposit and to have his civil service retirement annuity reduced at age 62 when his military service would be credited for social security purposes. *Id.* at 7-8.

2. In 1993, after petitioner became 62, OPM recomputed his civil service retirement annuity as required by law, see 5 U.S.C. 8332(j), and his annuity was reduced from $1390 to $845 per month. The social security benefit of $268 per month he began receiving at age 62 is smaller than this reduction in his annuity. Pet. App. 8. Petitioner requested permission to make the required deposit in order to retain credit toward his civil service retirement annuity for his post-1956 active military service. OPM denied this request because there was no evidence that government error was responsible for petitioner's failure to submit the deposit at the time of his retirement. *Id.* at 30-34.

3. The Merit Systems Protection Board (MSPB) affirmed. Pet. App. 20-29. The Administrative Judge (AJ) found that neither the statute nor its implementing regulations "requires either pre-separation counseling concerning or notice of the potential impact of the statutory and regulatory provisions." *Id.* at 26-27. Moreover, although petitioner testified that he never understood the ramifications of his 1988 election, the AJ rejected petitioner's testimony as "lacking in credibility" and found that, "before electing not to make a deposit, [petitioner] was clearly on notice of the consequences of such an action." *Id.* at 26. The Board denied petitioner's

petition for review, making the decision of the AJ final. *Id.* at 18-19.

4. The court of appeals affirmed. Pet. App. 1-11. The court found no basis for reopening the matter, reasoning that "unilateral mistake in signing an unambiguous election form that notifies the signer of the consequences of election" is not a ground for voiding a freely made election. *Id.* at 10. The majority believed that this "view is in harmony with and promotes the settled proposition that one is not relieved from the consequences of a written election absent a showing that mental incompetence, duress or fraud is the reason for an election one later seeks to void." *Id.* at 10-11. Judge Newman dissented on the ground that petitioner lacked the information necessary to exercise informed consent. *Id.* at 12-17.

ARGUMENT

Petitioner's case centers on his failure to take advantage of a statutorily authorized procedure to avoid what Congress has called "Catch-62." See S. Rep. No. 504, 97th Cong., 2d Sess. 231 (1982). Prior to 1982, a federal employee's civil service retirement annuity was reduced when the employee reached age 62 if the employee had served in the military after 1956 and if those post-1956 years of military service had been used in calculating the employee's total government service for purposes of his or her retirement annuity. *Ibid.*; see 5 U.S.C. 8332(j). The rationale for this reduction was that post-1956 military years are automatically creditable for purposes of Social Security. Without the reduction, employees reaching age 62 (when social security eligibility begins) would receive credit in two retirement systems for the same years of service. On the other hand,

"[t]he additional social security benefit gained for these years of military service often [did] not match the reduction in the civil service annuity." S. Rep. No. 504, *supra*, at 231.

In dealing with this problem, Congress chose not to eliminate the age 62 retirement-annuity reduction in its entirety. Instead, in 1982 Congress enacted a statutory procedure that employees could use to avoid the reduction if they so chose. Under the new system, an employee can receive credit for post-1956 active military service under both the civil service *and* social security systems (and thus avoid a reduction of the civil service annuity at age 62) by depositing a sum equal to 7% of the employee's total post-1956 military pay to the Civil Service Retirement and Disability Fund. See 5 U.S.C. 8334(j).

The Office of Personnel Management (OPM) has promulgated regulations implementing this statutory procedure. Under those regulations, an annuity applicant must make the required deposit "prior to final adjudication of the application for retirement or survivor benefits." 5 C.F.R. 831.2107(b)(1); see also 5 C.F.R. 831.2104(b), 831.2105(b); *Holtermann* v. *OPM*, 57 M.S.P.R. 380, 384-385 (1993). This adjudication ordinarily occurs at the time of retirement. If the deposit is not made at that time, the amount of the civil service retirement annuity will be reduced when the employee reaches age 62 unless the deposit requirement is subsequently waived.

1. Petitioner retired at age 57, did not make the required deposit, and was surprised to learn, five years after retirement, that his failure to make the deposit had a negative effect on his total retirement income. Petitioner argues (Pet. 9-15) that he did not make an informed decision not to make the 7% deposit

at retirement because the OPM Form "says nothing about the real effects of the election made thereon" (Pet. 10).

It is true that OPM Form 1515 and its attached information "do not include annuitant specific calculations, such as * * * the number of dollars by which the annuitant's civil service benefits will be reduced at the time of eligibility for Social Security benefits if the annuitant fails timely to make the required deposit," Pet. App. 5, even though such information is available at the time of an employee's separation. The form and its attachment do, however, "give unmistakable notice that a person's annuity will be reduced at age 62 if no deposit has previously been made to earn entitlement to the benefit of post-1956 military service." *Id.* at 5-6. The election form thus warned petitioner to read the attached information "carefully to be sure you understand the consequences of not making the deposit for military service," *id.* at 5, and the attached information informed petitioner that his civil service retirement annuity would be reduced when he reached age 62, unless he deposited 7% of his post-1956 military pay at retirement. Although petitioner was not given information about the amount of the reduction, he was put on notice that a decision not to make a deposit might have negative financial consequences.

We are not aware of any statute or regulation requiring OPM (or the employing agency) to provide annuitants with more specific information than was given to petitioner. Pet. App. 11. In similar contexts, courts have found that they do not have the authority to add notice requirements to statutes when Congress has declined to impose such requirements. See, *e.g.*, *Templeton* v. *OPM*, 951 F.2d 338, 340 (Fed. Cir.

1991); *Davis* v. *OPM*, 918 F.2d 944, 946-947 (Fed. Cir. 1990); *Nordstrom* v. *United States*, 342 F.2d 55, 59 (Ct. Cl. 1965).

2. Petitioner also argues (Pet. 14-16) that OPM erred in not permitting him to pay the 7% deposit (with interest) five years after his retirement. OPM does not, however, have the general discretion to waive a regulatory requirement.

The MSPB has determined that only three circumstances authorize OPM to waive a requirement established by regulation: (1) the regulation itself permits waiver; (2) the agency engaged in affirmative misconduct; or (3) the agency failed to provide notice of rights, if such notice is required by statute or regulation. See *Speker* v. *OPM*, 45 M.S.P.R. 380, 385 (1990), aff'd, 928 F.2d 410 (Fed. Cir. 1991) (Table). The court of appeals held that "the pertinent regulations do not provide any opportunity for waiver of the deposit-making deadline dates. [Petitioner] makes no claim that agency misconduct caused his 'mistaken' election, and the pertinent statutes and regulations do not require that notice be given to the annuitant." Pet. App. 9-10; accord *Holtermann* v. *OPM*, 57 M.S.P.R. at 384-385. OPM informs us that it does not grant waivers when none of those three circumstances is present. The MSPB thus properly sustained OPM's refusal to grant the requested waiver in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
MARC RICHMAN
RICHARD E. RICE
Attorneys

OCTOBER 1985